United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-2526

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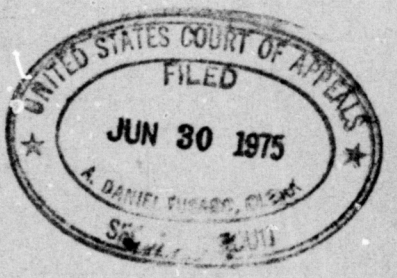

ZOLAR PUBLISHING CO., INC.,
Plaintiff-Appellant,

-against-

DOUBLEDAY & COMPANY INC., CORONET COMMUNICATIONS, INC. and INDEPENDENT NEWS CO., INC.,
Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

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3

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Defendants-Appellees

Docket No. 74-2526

REPLY BRIEF FOR ZOLAR, Plaintiff-Appellant.

In determining a motion for summary judgment, or an appeal from an order granting that relief, a full and complete examination of the facts and circumstances surrounding a transaction are to be considered before this drastic remedy is applied since the litigant's right to his day in court is foreclosed (Whitaker v. Coleman, 115 F 2d 305; Empire Electronics v. U.S., 311 F 2d 175).

The defenses raised by Doubleday seek refuge in a so called "integration" clause, their argument being that the single printed documents covering the Horoscope and the Encyclopedia so limit the transaction between the parties so as to deprive Zolar of its right to present facts, upon a trial, which will conclusively establish that the printed

contracts, or "Memorandum of Agreement" are nothing more than partial memoranda of the transactions between them.

Initially, and dealing with the Horoscope, there had been oral negotiations between Zolar and Rathbun, an editor for Doubleday. On March 18, 1963 she sent a letter to Zolar (A-106) in which she makes "a firm offer" and then proceeds to detail the amount of the advance, the arrangements for payment of the advance, a royalty of 6% of the retail price, a 95¢ retail price, 4% royalties on copies sold out of the United States, a publication consisting of 240 pages, each page containing 400 words of 39 lines and 57 characters, each page representing a bit more than Zolar's prior publication "It's All in the Stars", but only half the size of Zolar's prior pamphlets. In greater detail she provides for 8 pages of front matter, 19 pages for each of the 12 signs of the zodiac, 7 pages for general characteristics, 12 pages of which one page would be for each calendar month, 4 pages for a general introduction, with the entire project to be published by November 1963.

The foregoing is the complete subject matter which the defendant contends is excluded in the "Memorandum of Agreement" dated March 22, 1963 wherein it is described as "a work at present entitled Zolar's Family Horoscope hereinafter called 'the work'". The printed agreement is totally and

completely silent as to the actual make up and contents thereof (A-46). In paragraph 5A there is a requirement for the publisher Zolar to supply a "complete satisfactory manuscript" (A-47) but the printed agreement is completely silent as to the physical characteristics and editorial content of a "satisfactory manuscript". A reading of the two documents would serve to explain and limit that which was agreed upon to be performed by Zolar.

Rathbun's letter of March 18, 1963 (A-106) was clearly stated to be"a firm offer". Zolar's answer is set forth in his letter of March 20, 1963 (A-107) in which he says "I agree to accept the proposed terms * * * ". It is elementary as a matter of contract law that Rathbun's "firm offer" had been accepted at that point. A binding contract was the result of that exchange of correspondence.

In Zolar's letter of March 20, 1963 (A-107) there is the cautionary statement "the only provision being that I want a contract for one year only". But Rathbun's letter of March 18, 1963, when viewed in the light of the contents of the proposed publication, indicated that it was for twelve months only. There was no difference of opinion between them. There were further details covering the number of words and punctuation marks per line and the physical lay-out of the publication

referred to in her letter of March 26, 1963 (A-108). In Bruce King's affidavit in opposition to the motion he stated at A-88 "I was preparing a 1964 edition, usable in 1964 and for no other year". He stated further on the same page "this was known to the defendants, the fact that the 1964 edition was to be a test to see what the sales would be, and that I intended to bring out annual editions thereafter keyed and geared to a specific year." At A-89 he stated that "we were negotiating for the publication of a soft cover book whose life and usefulness would expire on December 31, 1964 and not intended to be offered for sale again". This again is not controverted by the defendant Doubleday. There will be submitted to this Court on the argument of this motion the Doubleday edition of the Horoscope which clearly states on its title page that it is a "1964 edition" and that it contains a moon table for 1964 (A-90). Doubleday's display boxes prominently featured "What Does 1964 Hold For You?" (A-110). Doubleday's senior editor, Barker, in referring to a Spanish reprint edition that had been authorized by Doubleday, sent a letter to Mr.King dated June 11, 1965 in which he stated that the Spanish rights were signed in 1964 and that the licensee knew that it was a "dated book" and further observing "I don't see how it is possible to get them to do a Family Horoscope in the current year. I admit it seems kind of silly, but there it is." (A-113).

Even the defendant Coronet knew that this was a 1964 edition (A-114).

The point of the matter is, as has been urged before, the Horoscope was, to quote the defendant, "a dated book" and like any treatise dealing with the specific position of the moon, stars, sun, planets and other terrestrial movements necessarily usable only on the given dates set forth therein, a fact known to the defendant Doubleday.

In arguing about the legal effects of the exchange of correspondence between the parties referred to above, it is elemental that the characterization of an instrument as being "integrated" or not is not controlling. The true nature of a contract is to be determined from the whole contract in its true light and not merely from its characterization (American Dock Co. v. City of New York, 174 Misc. 813, aff'd 261 A.D. 1063, aff'd 286 New York 658).

Facts and circumstances attendant at the time a contract is made are competent evidence for the purpose of placing the Court in the same situation and giving the Court the same advantages for construing the contract possessed by the actors (Haddock, Blanchard & Co. v. Haddock 192 NY 499). The questions presented are one of fact for consideration upon a trial (Union Trust Co. v. Whiton, 97 NY 172). There is no

plain meaning concerning the quality of contents of the "satisfactory manuscript" which can be determined from a reading of the "Memorandum of Agreement" relied upon by the defendant and calls for evidence relating to the intention and understanding of the parties (Skinner v. Paramount Pictures, 294 NY 474). The contract between Zolar and Doubleday must be read in the light of the surrounding circumstances which afford a key to the meaning and intention of the parties. Rules of construction do not confine a court in construing a writing to the very instrument in question. Other contemporaneous writings between the parties relating to the same subject matter are admissible in evidence to explain or qualify the agreement before the Court, (Wilson v. Randall, 67 NY 338). The rule has been, and it is particularly appropriate considering the fact that an agreement was consummated by Zolar's March 20, 1963 written acceptance of Doubleday's "firm offer" of March 18, 1963 that a binding agreement governing this transaction came into effect. The subsequent writing consisting of the printed "Memorandum of Agreement", executed thereafter, and being noticeably lacking in basic and material terms must be read and construed as one paper (Knowles v. Toone, 96 NY 534; Rogers v. Smith 47 NY 324).

It has been held that instruments which were executed at substantially the same time and related to the same subject matter are contemporaneous writings and will be read together as one (Nau v. Vulcan R. & C. Co., 286 NY 188). No accurate judgment can be formed by considering only a part of a series of documents (Hamilton v. Taylor, 18 NY 358).

Since Zolar's acceptance on March 20, 1963 constituted a binding contract for the Horoscope this Court must, realistically, consider those documents in conjunction with Doubleday's printed form as one document or as two directly related documents bearing on the same subject.

With respect to the question of what the intentions of the parties were concerning the time span of the publishing agreements, Zolar's preparation of a manuscript for the year 1964, received, approved and published by Doubleday is more representative of what the parties intended than is the printed "boiler plate" provision in Doubleday's printed form of contracts. Where the intent of the parties is conflicting it has been held for the jury to determine what the agreement was (Patten v. Pancoast, 109 NY 625). In any event it has been determined by the New York Court of Appeals in Cohen v. Berlin & Jones, 166 NY 292 that all of the facts and circumstances surrounding the execution of a contract should necessarily be

provided to the Court to determine just what the parties intended by it. This is a question of fact which should not have been determined on a motion for summary judgment.

Zolar does not claim that a contract did not exist between the parties for the Horoscope; it claims that the exchange of letters between Rathbun and Zolar referred to above, as well as the printed document entitled "Memorandum of Agreement", taken together represent the contract between the parties, including Zolar's statement that it be for one year. In this case Zolar does not urge the receipt of oral evidence but has submitted to the Court written documents which represent the best evidence as to what the intentions of the parties were and such writings are not inconsistent and do not contradict the "Memorandum of Agreement", but show the real contract (Ruppert v. Singhi, 243 NY 156; Di Menna v. Cooper & Evans, 220 NY 391; Thomas v. Scutt, 127 NY 133).

The defendant's position that it had the exclusive right to reprint the 1964 Zolar's Family Horoscopein 1970, or for the 28 year copyright period is ridiculous on its face. To publish the 1964 Horoscope in any subsequent year, to quote Mr.Barker, Doubleday's executive editor, "seems silly". Doubleday made a serious error in selling the rights to reprint a dated Horoscope, particularly since they had been

put on notice and had received copies of Zolar's 1966 and 1967 annual editions. Additionally, a fraud had been perpetrated not only upon Zolar but upon the purchasing public in offering an out-dated 1964 edition of Zolar's Family Horoscope without indicating that fact on the cover. When it was offered for sale to the reading public in 1970 it appeared on the newsstands before Zolar's 1971 edition, which was the sixth consecutive annual edition published by Zolar after being told by Doubleday to continue on its own. Doubleday thus acquired for itself the cream of a public sale that had been created by Zolar's five previous editions.

To permit, or to approve this conduct on the part of defendant Doubleday by narrowly construing the "Memorandum of Agreement" as argued by defendant Doubleday, is in effect to cause a miscarriage of justice. Since General Obligations Law, Section 15-301, relied upon by Doubleday, in effect is an extension of the Statute of Frauds, this Court has already gone on record as stating that the purpose of the Statute is not to permit fraud to take place.

Babdo Sales Inc. v. Miller-Wohl Co., an appeal decided by this Court on April 2, 1971, 440 F 2d 54, had before it the question of the propriety of directing summary judgment where, as in the instant appeal, questions of fact were clearly

demonstrated in moving and opposing papers. In that case discussions were had between the parties concerning the cancellation of certain existing leases in favor of new leases. Oral negotiations were thereafter referred to in subsequent letters between the parties. Formal written leases were never executed. However, the tenant proceeded to account for certain rentals under the old leases acknowledging that new leasehold agreements were taking effect and enclosing a final accounting under the old leases. The lower court granted summary judgment declaring that plaintiff was entitled to continue use and occupancy of the premises on the basis of the terms discussed and represented by shop memoranda maintained by the plaintiff and the letter acknowledging the new leases executed by the tenant. The primary question presented to this Court, on appeal, was whether these writings constituted the writings sufficient to take the case out of the Statute of Frauds or whether there was a genuine issue of material fact which made the grant of summary judgment improper. It was conceded that formal leases had never been executed by the landlord who regarded the renewals as ineffective. This Court at page 56 stated:

> "Once two parties have reached agreement on the material terms of a contract, it may or may not

become binding at that point depending solely on the intention of the parties. * * * Often it is a difficult question of fact whether the parties have this understanding; and there are very many decisions holding both ways. * * * It is a question of fact that the courts are deciding, not a question of law; and the facts of each case are numerous and not identical with those of any other case. In very many cases the question may properly be left to a jury. 1. Corbin Section 30." (See cases cited thereafter)

This Court dealt with the use of summary judgment and stated at page 57:

> "However, the question of intent in this situation is uniquely one of fact. Summary judgment is, of course, not to be used as a substitute for the trial of disputed issues of fact. As the Fifth Circuit has noted:
>
> > "Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. Whitaker v. Coleman 115 F.2d 305, 307 (5 Cir.1940). [See Empire Electronics v. United States, 311 F.2d 175 (2d Cir.1962)]."

With respect to the argument made by the appellant that the agreement could not come into being without a formal written and signed agreement this Court held that the defendant respondent should have had an opportunity to factually

substantiate such claims even though the evidence before the Court suggested otherwise. The Court further observed that the Statute of Frauds had as its main purpose the prevention of fraud, apparently having in mind the infirmity of memory. In the instant appeal plaintiff appellant Zolar relies upon uncontroverted writings between it and defendant Doubleday which unquestionably constituted an enforceable agreement between them. With respect to the argument made by the defendant respondent herein that only the "Memorandum of Agreement" should be considered in disposing of this appeal it is respectfully submitted that the proper approach, urged by Zolar and stated by the New York Court of Appeals in Crabtree v. Elizabeth Arden Sales Corp., 305 NY 48, is that:

> "The Statute of Frauds does not require the 'Memorandum * * * to be one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion'".

Continuing further, this Court emphasised the fact that the Crabtree case had received approbation on numerous occasions and observed at page 59:

> "Since 1953, the Courts of New York citing Crabtree extensively, have allowed litigants to satisfy the requirements of the Statute of Frauds with a confluence of memoranda (see cases cited therein)"

Under the authority of Stulsaft v. Mercer Tube & Manufacturing

Co., Supra, the majority of this Court remanded the case for trial on the issue of "contractual intent", an appropriate description of Zolar's position on this appeal.

Chief Judge Lumbard in his dissenting opinion observed that the numerous letters relating to the new terms of the leases for eleven of the stores involved constituted, in his opinion, a valid renewal agreement since the formal agreement of lease,which appellant ,claimed as the governing document,contained only standard terms and in effect "boiler plate" provisions which,in any event,would have to be considered by the preceding letters between the parties as showing "contractual intent" calling for affirmance of the lower court's opinion.

Under the authority of the Babdo case, Supra, at the very least summary judgment should be reversed and the case sent back for trial on the issue of "contractual intent".

Counsel is not aware of any final, definitive decision or law holding that only one document, under any circumstances, can constitute an agreement where the so-called exclusion of prior negotiation clause is contained therein.

Pursuing this Court's theory of "contractual intent" and based on further argument that the correspondence

between Doubleday and Zolar preceding the "Memorandum of Agreement" covering the Family Horoscope constitutes one agreement in several parts, it must necessarily follow that the typewritten portions, consisting of the exchange of letters, would prevail over the printed "boiler plate" portions of Doubleday's standard form of agreement.

In 10 New York Jurisprudence, Contracts, § 218 appearing at page 128 it is stated:

> "The rule is that in the event of repugnancy between written and printed clauses of an instrument, that which is written will prevail over that which is printed. Thus, where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will generally control. The reason greater effect is given to the written than to the printed part of an agreement, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims."

Continuing further the writer states at page 129:

> "Also, where a contract is upon a printed blank furnished by one of the parties, if its provisions are doubtful, uncertain, or repugnant, that which is written or typewritten should control the interpretation of the instrument."

The writer further continued at page 129:

> "But it is the imperative duty of courts to give effect, if possible, to all the terms of an

> agreement. The construction is to be made on a consideration of the whole instrument, and not on one or more clauses detached from the others; and this principle applies as well to instruments partly printed and partly written, as to those wholly printed or wholly written. Where the written and printed parts may be reconciled by any reasonable construction, as by regarding one as a qualification of the other, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent provisions."

Without consideration of the correspondence between Zolar and Doubleday culminating in Zolar's "acceptance", the description of the product bargained for as evidenced in the printed form of "Memorandum of Agreement" obviously is insufficient standing by itself to constitute a definite description of the bargain. 10 New York Jurisprudence, Contracts §219 at page 131 states:

> " It is a general rule in the construction of contracts that the contract is to be read in the light of the circumstances existing at the time of its making. In order to determine the nature of the thing promised, recourse to the circumstances attending the execution of the writing may be had. * * *."

The Courts of the State of New York has held that they have not been concluded by the phraseology adopted in a document, as for example in the "Memorandum of Agreement" the language stating that it represents the full agreement between the parties when it doesn't, and the Courts have ascertained the purpose and intention of the agreement by considering proof

of what was actually done under it. Chard v. Ryan-Parker Construction Co., 182 AD 455; Solomon Tobacco Co. v. Cohen 95 AD 297; Duttweiler v. Jacobs 223 AD 292. Even a post contract letter is admissible to show how the parties interpreted the agreement, Tanenbaum v. Levy 83 AD 319, aff'd 178 N.Y. 594. New York Jurisprudence, Contracts Volume 10, § 221 at page 135 states the applicable rule to be:

> "The practical construction put upon a contract by the parties to it is sometimes almost conclusive as to its meaning, and there is no surer way to find out what the parties mean than to see what they have done."

In this case all of the evidentiary material submitted to the Court below clearly established that the Family Horoscope was intended for one year, 1964, that it was a "dated" book, that it had no use or relevancy after December 31, 1964, and to have re-issued it at a later date, was, as stated by Mr.Barker, "kind of silly". The motion for summary judgment should have been denied in the lower Court and the facts supporting Zolar's position be given in sworn testimony so that the full meaning and interpretation of the agreement between the parties could be established.

The "Cancellation Intent"

Without belaboring the facts concerning the post

publication experiences relating both to the Family Horoscope and to the Encyclopedia, both transactions were ultimately phased out entirely, represented by writings showing that the parties intended to terminate their relationships. At the very least these writings are of such character as to require a trial of the issue of fact as to the intent, meaning and conduct of the parties with respect thereto. What has been said heretofor with respect to "contractual intent" is equally applicable to "cancellation intent".

For the foregoing reasons and the law applicable thereto it is respectfully submitted that the action of the Court below in granting defendant's motion for summary judgment and foreclosing any proof as to any "contractual intent" or "cancellation intent" was erroneous, should be reversed and the plaintiff given his day in court.

Respectfully submitted

Stanley M. Estrow
Attorney for Plaintiff-
Appellant

Zolar v. Doubleday

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of July, 1974 deponent served the within Brief upon Satterlee + Stephen

attorney(s) for

in this action, at 277 Park Ave. N.Y.C.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
29 day of July.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976